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Civil Procedure: I Win, You Pay: Considerations of Efficiency and Fairness in Minnesota Appellate Litigation of Attorney's Fees—T.A. Schifsky & Sons, Inc. v. Bahr Construction, LLC

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**CIVIL PROCEDURE: I WIN, YOU PAY:
CONSIDERATIONS OF EFFICIENCY AND FAIRNESS IN
MINNESOTA APPELLATE LITIGATION OF ATTORNEY'S
FEES—*T.A. SCHIFSKY & SONS, INC. v. BAHR
CONSTRUCTION, LLC***

Jeff Holth[†]

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I. INTRODUCTION

The 2007 Big Tobacco settlement resulted in the largest combined attorney's fee award in United States history.¹ As a result of the settlement, private attorneys hired by state attorneys general were awarded approximately \$15 billion in fees.² With the magnitude of this award in mind, it is no surprise that fee shifting has been credited with changing the way parties approach modern litigation.³ Indeed, Dan Dobbs was correct when he predicted that changes in the scope and the exceptions to the American Rule regarding attorney's fees "are likely to work a substantial impact on the way law is practiced."⁴

1. E.g., Mark Curriden, *Up In Smoke: How Greed, Hubris and High-Stakes Lobbying Laid Waste to the \$246 Billion Tobacco Settlement*, ABA JOURNAL E-REPORT, March 18, 2007, http://www.abajournal.com/magazine/article/up_in_smoke.

2. *Id.*

3. See David W. Robertson, *Court-Awarded Attorney's Fees in Maritime Cases: The "American Rule" in Admiralty*, 27 J. MAR. L. & COM. 507, 512 (1996) (explaining that the change in scope and exceptions to the American Rule regarding attorney's fees are likely to substantially impact the way law is practiced); see also Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 437 (1986) ("The practice of awarding attorney fees against adversaries is causing important changes in the way litigation is financed in the United States.").

4. DAN B. DOBBS, LAW OF REMEDIES 276-77 (2d ed. 1993).

In 1870, Congress created the first fee-shifting⁵ statute that awarded attorney fees to the prevailing plaintiff at trial.⁶ The law was passed following the Civil War “to ensure the enforcement of the newly enacted civil rights acts.”⁷ Since that time, awarding attorney’s fees to a prevailing litigant has become an increasingly common practice at both the state and federal level.⁸

Beginning in the mid-1970s, federal statutes that allowed for attorney’s fee awards increased dramatically.⁹ Specifically, the number of federal fee-shifting provisions increased from approximately 30 in 1975 to approximately 150 in 1983.¹⁰ At the same time, scholarly work devoted to the issue of attorney’s fees increased as authors turned their attention to the fee-shifting phenomenon.¹¹ Some took a critical approach to the topic, arguing that fee shifting compromised what Justice Stewart had dubbed the court system’s “prime goal” of securing the “just, speedy, and inexpensive determination of every action and proceeding.”¹² In particular, Michael D. Green’s extensive analysis

5. The term “fee shifting” is used throughout this note and generally refers to the rules that decide which party will pay for the attorney’s fees accrued by both parties during the litigation. See Ronald Breautigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONTEMP. PROBS. 173, 173 (1984).

6. Kyle R. Kravitz, Note, *Denying the Devil His Due: Contingency Fee Multipliers After City of Burlington v. Dague*, 38 VILL. L. REV. 1661, 1661 (1993) (analyzing the Supreme Court’s decision in *Burlington v. Dague* and arguing for several permissible alternatives to contingency enhancement).

7. *Id.*

8. 1 ROBERT L. ROSSI, ATTORNEYS’ FEES § 6:7 (3d ed. 2009).

9. *Id.*

10. *Id.*

11. See generally Joan Chipser, *Attorney’s Fees and the Federal Bad Faith Exception*, 29 HASTINGS L.J. 319 (1977) (providing a historical overview of the federal bad faith exception and arguing for its adoption in California); Dobbs, *supra* note 3 (discussing the bases for attorney’s fees, who is entitled to them, and how they are calculated); John Luebsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984) (providing a detailed account of the American Rule from the emergence of colonial legislation to the partial abandonment of the rule due to emerging exceptions in the second half of the twentieth century); John J. Sullivan, *The Equal Access to Justice Act in the Federal Courts*, 84 COLUM. L. REV. 1089 (1984) (arguing for an expansive construction of the “substantially justified” test within the Equal Access to Justice Act to permit fee awards when the government’s actions and arguments were not part of a dispute in which there was some likelihood it could have prevailed); Joyce M. Zehr, *Attorney’s Fees*, 55 GEO. WASH. L. REV. 793 (1987) (providing a practical overview of the D.C. Circuit Court of Appeals’ posture towards the application of attorney’s fees in addition to examining the policy implications for and against allowing waivers as a condition for settlement).

12. *Herbert v. Lando*, 441 U.S. 153, 202 (1979) (Stewart, J., dissenting)

of the effect of fee shifting on efficiency and fairness pointed to two critical problems related to attorney's fees: (1) an increase in piecemeal appeals¹³ and (2) confusion regarding the appropriate time to appeal.¹⁴

Recently, the Minnesota Supreme Court addressed similar concerns regarding attorney's fees in *T.A. Schifsky and Sons, Inc. v. Bahr Construction, LLC*.¹⁵ While the court's decision does not illuminate the degree to which fee shifting has burdened courts and litigants, it does indicate that problems relating to fee shifting in Minnesota persist. In light of *T.A. Schifsky*, this note attempts to analyze issues of attorney's fees in Minnesota with a focus on procedural efficiency and fairness to litigants. Given that similar analyses have often been confined to a federal perspective, an analysis at the state level is particularly important.¹⁶

(citing FED. R. CIV. P. 1); see also Richard S. Crummins, *Judgment on the Merits Leaving Attorney's Fees Issues Undecided: A Final Judgment?*, 56 FORDHAM L. REV. 487, 488 (1987) ("[F]ee issues are often determined many months after liability issues have been resolved. This delay, when considered in light of the requirement that a judgment be 'final' before it may be appealed, poses serious problems for litigants who, understandably, wish to expedite the resolution of their disputes by appealing as early as possible."); Michael D. Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 211 (1984) ("With the increasing frequency and significance of fee shifting has come substantial confusion over when, during a given case, the issue of attorney's fees must be decided, the appropriate procedural devices for raising and deciding a fee request, and the extent to which resolution of the fee issue is a predicate for appellate jurisdiction."). Minnesota has adopted this same language to guide state proceedings. See MINN. R. CIV. P. 1 ("[The rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

13. See Green, *supra* note 12, at 276 ("Severing defendants' fees from the merits produces many of the disadvantages previously discussed in the context of plaintiffs seeking fees. These include enlarging the number of piecemeal appeals . . .").

14. *Id.* at 211 ("Where an individual has asserted a claim for attorney's fees, this confusion has resulted in the loss of the right to appellate review of the merits of the case or appellate review of an award of attorney's fees.").

15. 773 N.W.2d 783, 785 (Minn. 2009).

16. An analysis of the issues involving attorney's fees appeals in California has been published. Jineen T. Cuddy, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds*, 24 PAC. L.J. 141 (1992) (urging the California courts or state legislature to resolve the judicial confusion regarding whether a judgment for attorney's fees is automatically stayed pending appeal); see also ROSSI, *supra* note 8 at § 11:1 ("A few jurisdictions have adopted the 'private attorney general' exception to the American Rule, under which fees may be allowed where litigation vindicates a public policy, but attempts to have such a broad rule recognized have generally been unsuccessful.").

This note begins by outlining the origins of fee reallocation in America and in Minnesota.¹⁷ Part III provides a chronological outline of important Minnesota Supreme Court decisions that address the treatment and characterization of attorney's fees.¹⁸ Part IV is devoted to a discussion of the recent Minnesota Supreme Court decision in *T.A. Schifsky*.¹⁹ Part V of the note addresses Green's criticisms related to the effects of fee shifting within the context of Minnesota case law. Specifically it discusses (1) whether Minnesota's treatment of attorney's fees burdens courts with inefficient, piecemeal appeals, and (2) whether Minnesota's characterization of attorney's fees nurtures unfairness within the appeals process.²⁰

With respect to the first issue, the note concludes that while Minnesota case law allows for attorney's fees to be appealed separately from the merits, this allowance does not burden the court system with piecemeal appeals.²¹ This is because district courts generally rule on attorney's fees in an expedient manner, which in turn allows appellate courts to consolidate attorney's fees appeals with appeals on the merits and prevent piecemeal litigation. With respect to the second issue—fairness to litigants—the note concludes that the holding in *T.A. Schifsky* fails to provide the necessary guidance for litigants to confidently anticipate the running of the appeals period.²² In order to prevent confusion and untimely appeals, two solutions are proposed that may provide some clarity to the inherently complex relationship between attorney's fees and merit-based judgments.

II. HISTORY OF ATTORNEY'S FEES

A. *The English Rule Regarding Attorney's Fees*

The prevailing maxim under the English Rule regarding attorney's fees can be summarized in three simple words: the loser pays.²³ Under the English Rule, "a losing litigant must pay the

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part IV.

20. See *infra* Part V.

21. See *infra* Part V.

22. See *infra* Part V.

23. 20 AM. JUR. 2D *Costs* § 55 (2005).

winner's costs and attorney's fees."²⁴ Enacted in 1275, the Statute of Gloucester was the probable origin of the English Rule.²⁵ Despite its limitations on the disbursement of costs, the statute was the first to give plaintiffs a right to fees in "specified real property actions."²⁶ While early English courts allowed the Chancellor to award attorney's fees to the prevailing party, the Chancellor rarely exercised this power.²⁷

Over time, and primarily by statute, the rules pertaining to attorney's fees expanded in English courts.²⁸ While traditional fee-shifting rules often favored the plaintiff, defendants were given power to recover attorney's fees on the same basis around the turn of the fifteenth century.²⁹ Enacted in 1875, Order 55 of the Rules of Court provided that costs and attorney's fees attached to court proceedings would be under the sole discretion of the English courts.³⁰ Despite its elaborate system of taxing costs, the modern English system is still heavily influenced by the principle of "the loser pays."³¹

B. *The Development of the American Rule*

The American Rule provides that all litigants must bear their own attorney's fees absent statutory or contractual authorization.³² It may be difficult to provide a historical synopsis of the American

24. BLACK'S LAW DICTIONARY 609 (9th ed. 2009).

25. Geoffrey Woodroffe, *Loser Pays and Conditional Fees – An English Solution?*, 37 WASHBURN L.J. 345, 345 (1998) (discussing the historical development of both the English Rule and the American Rule and comparing the merits of each approach to the issue of attorney's fees).

26. *Id.*; see also Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929) (explaining that the Statute of Gloucester was "[t]he first statute which gave the plaintiff his costs, and the one on which the whole law on the subject was based until 1875").

27. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570 (1993).

28. *Id.* at 1571.

29. Goodhart, *supra* note 26, at 853.

30. *Id.* at 854.

31. The continued adherence to the English Rule has created some additional gridlock and delay in English courts. See Vargo, *supra* note 27, at 1571 ("Under this system, the solicitor representing the winning party prepares a bill of costs, detailing each item of taxable expense. If the losing party agrees, it pays the bill; parties, however, rarely agree. When disputed, the parties present their itemized expenses to a taxing master who decides the appropriate amounts after a hearing.").

32. BLACK'S LAW DICTIONARY 98 (9th ed. 2009); 20 AM. JUR. 2D *Costs* § 55 (2005).

Rule in light of John Leubsdorf's assertion that "the American Rule has no history."³³ However, this difficulty is likely because, "as far back as one can trace, courts in [America] have allowed winning litigants to recover their litigation costs from losers only to the extent prescribed by the legislature."³⁴ Prior to American independence, colonial legislatures commonly passed laws that limited the amount that attorneys could charge for their services and the amount that "could be recovered from a defeated adversary."³⁵ However, lawyers in the colonies refused to revert to the complexities of the English Court system and began emerging as "private profit-seekers" during the time of the American Revolution.³⁶ Lack of legislative interference with private attorney-client fee agreements was an important factor in the establishment of the American Rule.³⁷

The American Rule has confronted numerous challenges throughout its history.³⁸ However, 179 years after the Supreme Court adhered to the Rule in *Arcambel v. Wiseman*, the Court reiterated its loyalty to the Rule in *Alyeska Pipeline Service Co. v. Wilderness Society*.³⁹ Referring to the American Rule, the *Alyeska* Court stated: "It is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents and followed by the Court of Appeals."⁴⁰

33. Luebsdorf, *supra* note 11, at 9.

34. *Id.*; see *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796). Responding to the circuit court's decision to charge the losing party \$1,600 in attorney's fees, the Court stated,

[w]e do not think this charge ought to be allowed. The general practice in the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.

Id.

35. Luebsdorf, *supra* note 11, at 10.

36. *Id.* at 13.

37. Vargo, *supra* note 27, at 1575.

38. John M. Bjorkman, *Minnesota and the American Rule: The Recoverability of Attorneys' Fees Following In Re Silicone Implant Insurance Coverage Litigation*, 30 WM. MITCHELL L. REV. 541, 542 (2003) (providing a thorough, detailed history of the American Rule and its application in Minnesota courts).

39. See *Arcambel*, 3 U.S. at 306; *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 271 (1975).

40. *Alyeska*, 421 U.S. at 271.

Despite the American Rule's continued relevance in the American legal landscape, a number of exceptions have diminished its prominence over time. For example, an award of attorney's fees may be based on a court's inherent power to sanction.⁴¹ This practice is often dubbed the "bad faith exception" to the American Rule.⁴² In addition, attorney's fees may also be recovered when a contract under which the plaintiff brings suit includes a fee-shifting provision.⁴³ Luebsdorf notes that the contractual exception was the most important exception during the late nineteenth century "if importance is measured by frequency of use."⁴⁴ As courts were acknowledging the shifting of fees based on private contracts, both federal and state legislatures began eroding the American Rule through statutory provisions.⁴⁵ Over the past century, the proliferation of such statutes at both the federal and state level has chipped away at the American Rule's dominance in the United States' judicial landscape.⁴⁶

C. *A Brief History of Fee Shifting in Minnesota*

The Minnesota Supreme Court recognized the American Rule as early as 1874.⁴⁷ In *Kelly v. Rogers*, the court held that the plaintiff could not recover attorney's fees incurred as a result of the defendant's fraudulent actions.⁴⁸ Just three years later, the court reaffirmed the importance of the Rule in *Frost v. Jordan*, holding that the defendant could not recover the attorney's fees he incurred as a result of defending an attachment bond action.⁴⁹ Interestingly, in both early cases, the court justified the denial of attorney's fees in part by alluding to the unfairness of providing

41. 20 AM. JUR. 2D *Costs* § 56 (2005). This list of exceptions to the American Rule cited in this section is demonstrative, not exhaustive. Other exceptions include common fund attorney's fees and the third-party exception. See Vargo, *supra* note 27, at 1579–81; see also Bergquist v. Kreidler, 158 Minn. 127, 130, 196 N.W. 964, 965 (1924) (applying the third-party exception to the American Rule).

42. See Chipser, *supra* note 11, at 319.

43. Luebsdorf, *supra* note 11, at 24.

44. *Id.*

45. *Id.* at 25.

46. *Id.* at 29–30 ("While the courts were expanding these exceptions to the American Rule, legislatures were also coming around to the view that at least some litigation was a desirable thing. Fee provisions were attached to a variety of federal statutes, and also to state statutes.").

47. Bjorkman, *supra* note 38, at 543.

48. *Kelly v. Rogers*, 21 Minn. 146, 152–53 (1874).

49. *Frost v. Jordan*, 37 Minn. 544, 547, 36 N.W. 713, 714 (1887).

attorney's fees for one party over the other.⁵⁰ Although the Minnesota Supreme Court recognized the importance of the American Rule, the court limited the Rule from the bench. For example, in 1924, the court recognized the third-party exception.⁵¹ In *Bergquist v. Kreidler*, the court determined that parties thrust into the litigation by a third party's fraudulent misrepresentation are entitled to recover attorney's fees as a part of the damages in the case.⁵²

In the early nineteenth century, many states began to pass laws concerning the allocation of costs and attorney's fees.⁵³ The first set of these statutes was passed during the Granger Era and concerned the reallocation of attorney's fees in the event that a railroad was found liable for harming livestock or charging unlawful rates.⁵⁴ Influenced by this legislation, in 1874 the Minnesota Legislature adopted its first statute that provided for the reallocation of attorney's fees.⁵⁵ Section fifteen of the statute provided:

[T]he person, or corporation, or town, village or city so offended against, may, for each offense, recover of such railroad corporation . . . three times the amount of damages sustained by the party aggrieved, together with the costs and reasonable attorney's fee, to be fixed by the court when the same is heard on appeal or otherwise, and taxed as part of the costs of the case.⁵⁶

50. Articulating its rationale for denying the plaintiff's request for fees, the *Kelly* court stated: "[T]o allow these expenses to the plaintiff, which are never allowed to a successful defendant, would give the former an unfair advantage in the contest." *Kelly*, 21 Minn. at 152. The *Frost* court stated: "[T]o allow attorney's fees would give the defendant in the attachment suit an unfair advantage over the plaintiff." *Frost*, 37 Minn. at 546, 36 N.W. at 714.

51. *Bergquist v. Kreidler*, 158 Minn. 127, 130, 196 N.W. 964, 965 (1924).

52. *Id.* Specifically, the court stated:

[T]he burden of a mischoice, made in good faith and upon reasonable grounds for the action taken, should be placed on the wrongdoer rather than his victim. That result will be accomplished only by holding that the latter may recover the reasonable expenses of litigation, undertaken in good faith and upon reasonable grounds, to avoid the results of the defendants' wrong.

Id.

53. Vargo, *supra* note 27, at 1577.

54. Luebsdorf, *supra* note 11, at 25.

55. 1874 Minn. Laws 148.

56. *Id.* The quoted language is taken from Chapter XXVI, Section 15.

In 1930, the Minnesota Supreme Court recognized the continuing trend of statutory fee shifting as an important exception to the American Rule.⁵⁷ While the court noted that the winning party generally does not have the privilege of attorney's fee reimbursement, it did recognize that "[t]here are statutory provisions for allowing attorney's fees to the successful party in certain kinds of actions."⁵⁸ In many states, provisions for the reallocation of attorney's fees became more prevalent during the second half of the twentieth century.⁵⁹ Minnesota seems to have followed this trend.⁶⁰ Minnesota statutes included 444 fee-shifting provisions at the end of the 2008 legislative session.⁶¹ Attorney's fee provisions are now common in a variety of Minnesota statutes, such as those concerning liens,⁶² corporate business practice,⁶³ and environmental regulations.⁶⁴

57. *Smith v. Chaffee*, 181 Minn. 322, 324–25, 232 N.W. 515, 516 (1930).

58. *Id.* at 324, 232 N.W. at 516.

59. Rossi, *supra* note 8, § 6:7.

60. While an index search is not conclusive as to statutory trends, a comparison of the statutory indexes from 1941 and 2008 indicates a vast disparity in the amount of provisions in Minnesota statutes that allow for the reallocation of attorney's fees. Compare 2 REVISOR OF STATUTES, MINNESOTA STATUTES 4426–27 (1941) (the index of Minnesota statutes lists nineteen provisions for the reallocation of attorney's fees under the topic heading "Attorneys At Law" and subheading "Fees and Compensation"), with 13 REVISOR OF STATUTES, MINNESOTA STATUTES 953–56 (2008) (the index of Minnesota statutes lists 339 provisions for the reallocation of attorney's fees under the topic heading "Attorney's Fees"). Moreover, because the 2008 index references multiple other sections in which relevant provisions can be found, the number of Minnesota statutory provisions for the reallocation of attorney's fees in 2008 exceeds the number listed under the heading "Attorney's Fees." 13 REVISOR OF STATUTES, MINNESOTA STATUTES 953-56 (2008); see also *infra* note 61.

61. See Information Brief from Matt Gehring, Legislative Analyst, Research Department, to Minnesota House of Representatives (Nov. 2008), available at <http://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf>.

62. See MINN. STAT. § 270C.63, subdiv. 15 (2008) (providing for an award of attorney's fees if a lien is found to be erroneous); MINN. STAT. § 514.945, subdiv. 8 (2008) (providing for an award of attorney's fees to the prevailing party in an agricultural producer's lien); MINN. STAT. § 514.99, subdiv. 5 (2008) (providing for an award of attorney's fees in certain common law lien cases).

63. See MINN. STAT. § 302A.461, subdiv. 4(a) (2008) (providing for an award of attorney's fees in the event that a corporation unsuccessfully applies for an order banning the disclosure of commercially sensitive information); MINN. STAT. § 302A.467 (2008) (providing discretion for a court to award attorney's fees when a corporate officer violates a statute within Chapter 302A).

64. See MINN. STAT. § 115.072 (2008) (providing for an award of "litigation expenses incurred by the state" when the state prevails in securing a civil penalty, injunctive relief, or an action to compel compliance under Minnesota's Water Pollution Control Act); MINN. STAT. § 115A.86, subdiv. 6(c) (2008) (providing for

III. THE INTERACTION BETWEEN FEE-SHIFTING STATUTES AND THE FINAL JUDGMENT RULE

A. *A Common Conundrum: The Effect of Attorney's Fees Appeals on the Finality of Judgments*

A final judgment is “a court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and, sometimes attorney’s fees) and enforcement of the judgment.”⁶⁵ According to the final judgment rule, a party can only appeal from a final decision or judgment in the absence of a statute or rule that dictates otherwise.⁶⁶ Where a trial court’s decision is not final, the appellate court does not have jurisdiction over the appeal and must dismiss it.⁶⁷ While the final judgment rule was first embodied in a federal statute, most states have adopted it in a similar form.⁶⁸ As with many legal principles, however, the final judgment rule is more easily stated than applied.⁶⁹ One can no longer assume that the last order in the case is the only final appealable order.⁷⁰

Two competing policies underlying the final judgment rule have nurtured the continued confusion over the rule’s application: preventing costly, inefficient piecemeal appeals and minimizing delay when appealing a judgment.⁷¹ Proponents of the final judgment rule argue that the rule furthers an efficient court system

an award of attorney’s fees for a county in the event that a party delivers mixed waste to an improper facility).

65. BLACK’S LAW DICTIONARY 919 (9th ed. 2009). Worded differently, a judgment is not final if an additional claim has yet to be resolved. 3 ERIC J. MAGNUSON & DAVID F. HERR, MINNESOTA PRACTICE SERIES: APPELLATE RULES ANNOTATED § 103.6(b) (2010).

66. 4 AM. JUR. 2D *Appellate Review* § 79 (2007).

67. *Id.* The final judgment rule is a jurisdictional requirement. *Id.* While almost all jurisdictions adhere to it, its application depends on its adoption in the form of a statute or rule. *Id.*

68. See 28 U.S.C. § 1291 (2006) (“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .”).

69. Annotation, *Appealability, Under U.S.C.A. § 1291, of Order Awarding or Denying Attorneys’ Fees*, 73 A.L.R. FED. 271 (1985) (discussing how the problem of determining whether an order is tied to the merits of the case is particularly troublesome for an order awarding attorney’s fees).

70. See *id.*; see also BLACK’S LAW DICTIONARY 919 (9th ed. 2009) (illuminating the inconsistent effect that attorney’s fee determinations have on final judgments by stating that final judgments dispose of all issues “except for the award of costs (and, sometimes, attorney’s fees).”).

71. Crummins, *supra* note 12, at 491.

by reducing the number of appeals.⁷² In addition, the rule has the effect of consolidating all claims of error into one appellate proceeding.⁷³ Consolidation not only reduces court costs and attorney's fees for litigants, but also ensures that judges are hearing appeals in an efficient manner that prevents the clogging of dockets.⁷⁴ On the other hand, a strict application of the final judgment rule can cause significant delay in appellate review that may further burden the court system.⁷⁵ In some circumstances, such a delay can also cause harm to the party denied immediate review.⁷⁶

A pending determination of attorney's fees subsequent to a judgment on the merits provides a practical glimpse into the tension between these two competing policies.⁷⁷ In some jurisdictions, a pending attorney's fee determination may prevent the original judgment from becoming final and appealable, thus preventing the possibility of the attorney's fee issue being appealed separate from the merits.⁷⁸ In these jurisdictions, the attorney's fees are often considered to be attached to the merits.⁷⁹ In other jurisdictions, the attorney's fee determination does not prevent an initial judgment from becoming final, meaning the initial judgment can be appealed without delay.⁸⁰ These jurisdictions often characterize the attorney's fees as collateral to the merits of the case.⁸¹ In either case, the relationship between the attorney's fee issue and the initial judgment has significant consequences for litigants' ability to properly appeal in Minnesota because of its

72. *Id.*

73. *Id.*

74. *See id.*

75. *See id.*; Green, *supra* note 12, at 215–16.

76. Green, *supra* note 12, at 215–16 (“More serious hardships resulting from the final decision requirement may include losing a unique piece of property without any opportunity to recover it after a successful appeal, or suffering ‘irreparable injury’ when injunctive relief is incorrectly denied.”).

77. Crummins, *supra* note 12, at 488; *see also* Annotation, *supra* note 69, at 271.

78. *See* Local Union No. 1992 of Elec. Workers v. Okonite Co., 358 F.3d 278, 287 n.13 (3d Cir. 2004) (noting the exception when attorney's fee issues are not collateral to the merits of the litigation because they are an integral part of the contractual relief sought).

79. *Id.*

80. United States *ex rel.* Shutt v. Cmty. Home & Health Care Servs., Inc., 550 F.3d 764, 766 (9th Cir. 2008) (citing Int'l Ass'n of Ironworkers Local Union 75 v. Madison Indus., Inc., 733 F.2d 656, 659 (9th Cir. 1984)) (adopting the bright-line rule that “all attorney's fees requests are collateral to the main action”).

81. *Id.*

effect on the proper time to appeal.⁸²

In the past, Minnesota courts generally held that a judgment had to be “complete” in order for an appeal to be proper.⁸³ Despite these efforts, issues continue to arise regarding the relationship between attorney’s fees, final judgments, and proper appellate procedure in Minnesota. The following section provides an overview on how Minnesota courts have addressed the complex relationship between a final judgment and a subsequent determination of attorney’s fees.

B. Attorney’s Fees Litigation in Minnesota—The “Collateral” vs. “Attached to the Merits” Characterization

1. Spaeth v. City of Plymouth

In 1984, the Minnesota Supreme Court first addressed the relationship between a subsequent determination of attorney’s fees and a final, appealable judgment in *Spaeth v. City of Plymouth*.⁸⁴ In *Spaeth*, the plaintiff sought attorney’s fees and petitioned the court to compel the city of Plymouth to initiate eminent domain proceedings on his flooded property.⁸⁵ The trial court granted the

82. On December 7, 1967, the Minnesota Legislature adopted Minnesota Rules of Civil Appellate Procedure 104.01 and 103.03, which codified prior statutes setting forth the necessary criteria for a proper appeal. MINN. R. CIV. APP. P. 103.03; MINN. R. CIV. APP. P. 104.01. The former civil appellate procedural rules regarding time for filing and service of a civil appeal were codified by statute and were subsequently repealed after the adoption of additional appellate procedural rules in 1967. MINN. STAT. § 605.08 (repealed 1974). Rule 104.01 was later simplified by an amendment in 1998 that established a shorter, sixty-day period to appeal from both final judgments and appealable orders. MINN. R. CIV. APP. P. 104.01. In addition, Rule 103.03 of the Minnesota Rules of Civil Appellate Procedure was amended in 1998 to make clear that only final judgments or partial judgments under Rule 54.02 are appealable. MINN. R. CIV. APP. P. 103.03(a); see MAGNUSON & HERR, *supra* note 65. Therefore, according to the current Minnesota rules, an individual filing a notice of appeal must do so within sixty days of the judgment or order, but must also ensure that the judgment is final in nature. MINN. R. CIV. APP. P. 103.03(a); MINN. R. CIV. APP. P. 104.01. Once a judgment is deemed final, the limited time for appeal begins to run. See MINN. R. CIV. APP. P. 104.01.

83. See *In re Estate of Colby*, 223 Minn. 157, 157, 25 N.W.2d 769, 769 (1947) (holding that where costs had not been taxed and had not been waived, the judgment is considered incomplete and any appeal should be dismissed as premature); see also MAGNUSON & HERR, *supra* note 65, at § 103.6 (noting that in older Minnesota cases, the judgment had to be “complete” in order for an appeal to be available).

84. 344 N.W.2d 815, 825 (Minn. 1984).

85. *Id.* at 817.

plaintiff's writ of mandamus and ordered the city to commence eminent domain proceedings.⁸⁶ In addition, the court held that the plaintiff was entitled to attorney's fees and expert fees pursuant to Minnesota Statutes section 117.045.⁸⁷ Before the trial court decided on the amount of fees, the city appealed.⁸⁸ The trial court then awarded the plaintiff fees in the amount of \$66,158.12.⁸⁹ The city appealed again, challenging both the trial court's continuing jurisdiction to decide the amount of attorney's fees and the amount of attorney's fees the court awarded.⁹⁰ The supreme court subsequently consolidated both appeals into a single proceeding.⁹¹

On appeal, the city argued that the filing of its first notice of appeal divested the trial court of jurisdiction to decide on issues relating to the attorney's fees.⁹² At the time of the Minnesota Supreme Court's review of *Spaeth*, Minnesota Rule of Civil Appellate Procedure 108.03 provided that perfection of an appeal "shall stay all further proceedings in the trial court upon the judgment or order appealed from or the matter embraced therein; but the trial court may proceed upon any other matter included in the action, and not affected by the judgment or order appealed from."⁹³ Therefore, the continuing jurisdiction of the trial court to determine issues relating to attorney's fees depended on whether the attorney's fees were considered collateral to the merits or attached to the merits of the underlying litigation.⁹⁴

Ultimately, the court concluded that attorney's fees pursuant to section 117.045 were inherently "a matter independent of the merits of the litigation."⁹⁵ In its reasoning, the court noted that a decision to provide trial courts with continuing jurisdiction over attorney's fee determinations would not undercut the policy

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 824.

93. MINN. R. CIV. APP. P. 108.03.

94. *Spaeth*, 344 N.W.2d at 824. The consolidation of the two appeals was likely an attempt by the court to show that the trial court's continuing jurisdiction over attorney's fees would not undercut the policy against piecemeal appeals. Through consolidation, the court was able to hear all issues regarding the attorney's fees and eminent domain actions in one proceeding. *See id.* at 817.

95. *Id.* at 825.

against piecemeal appeals.⁹⁶ Summarizing a case in which the Seventh Circuit Court of Appeals decided to provide the district court with continuing jurisdiction over an attorney's fee determination, the Minnesota Supreme Court stated:

It also concluded that to do so would not undercut the policy against piecemeal appeals. Rather, it believed such a rule would be less likely to cause delay and waste effort because the attorneys' fees motion may be decided before the pending appeal has been argued and thus an appeal from the ruling on attorneys' fees could be consolidated with the pending appeal.⁹⁷

Moreover, because the plaintiff's claim for attorney's fees was collateral to the merits of the case, the fee award after the judgment on the merits was proper and did not affect the finality of the original judgment.⁹⁸

2. *Welsh v. City of Orono*

Just six months after its decision in *Spaeth*, the Minnesota Supreme Court broadened the "collateral" nature of attorney's fees in *Welsh v. City of Orono*.⁹⁹ *Welsh* involved an action for declaratory and injunctive relief brought by a landowner after the city denied his application for a conditional use permit to conduct lakebed dredging.¹⁰⁰ *Welsh* moved for summary judgment on the grounds that the city did not have jurisdiction to regulate his activities.¹⁰¹ The trial court granted summary judgment and ordered the city to cease its interference with *Welsh's* dredging activities.¹⁰² *Welsh* then moved for attorney's fees pursuant to 42 U.S.C. § 1988.¹⁰³ When the trial court denied the motion, *Welsh* appealed.¹⁰⁴

As a means of removing the attorney's fees issue from the appeal, the city of Orono echoed the defendant's argument in *Spaeth*¹⁰⁵ and asserted that the trial court was "without jurisdiction to

96. *Id.*

97. *Id.* (citing *Terket v. Lund*, 623 F.2d 29, 34 (7th Cir. 1980)).

98. *Id.* at 825-26.

99. 355 N.W.2d 117, 124 (Minn. 1984).

100. *Id.* at 119.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 123; see *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 824 (Minn. 1984).

make any order or render any decision affecting the order appealed from.”¹⁰⁶ Citing *Spaeth*, the court explained that it had adopted the collateral proceeding approach in interpreting an inverse condemnation attorney’s fee provision and that it saw “no reason why [it] should not apply the same approach in resolving timeliness of post-judgment motions for attorney fees under 42 U.S.C. § 1988.”¹⁰⁷ Therefore, the court determined that the attorney’s fee issue in *Welsh* would be characterized as independent of the merits of the litigation.¹⁰⁸

3. *American Family Insurance Company v. Peterson*

Two years after embracing the “collateral” nature of attorney’s fees in *Spaeth* and *Welsh*, the Minnesota Supreme Court came to the opposite conclusion in *American Family Mutual Insurance Co. v. Peterson*.¹⁰⁹ In *Peterson*, the trial court entered the original judgment and reserved the issue of attorney’s fees for later consideration.¹¹⁰ Ultimately, the defendant-insured was awarded attorney’s fees based on his claim that American Family Insurance refused to defend him in bad faith.¹¹¹ Reversing the court of appeals, the Minnesota Supreme Court held that absent an express determination that the original judgment was final and appealable, “the 90-day appeal period [did] not begin to run until the entry of the amended judgment adjudicating all issues, including the issue of attorney fees.”¹¹² As such, the court impliedly concluded that the issues involving attorney’s fees in *Peterson* were not collateral to the

106. *Welsh*, 355 N.W.2d at 123. This language summarizes the prior Minnesota Supreme Court decision in *State v. Bentley*, 216 Minn. 146, 161, 12 N.W.2d 347, 356 (1943).

107. *Welsh*, 355 N.W.2d at 124. However, the court refused to reverse the trial court’s denial of *Welsh*’s motion for attorney’s fees. *Id.* The court concluded that “a private action questioning a municipality’s regulatory jurisdiction under state law” was not within the “spirit” of section 1988 governing fee awards. *Id.*

108. *Id.*

109. 380 N.W.2d 495, 495 (Minn. 1986).

110. *Id.* at 497.

111. *T.A. Schifsky*, 773 N.W.2d 783, 789 (Minn. 2009) (citing *Am. Family Mut. Ins. Co. v. Peterson*, 393 N.W.2d 212, 217 (Minn. Ct. App. 1986), *rev’d*, 380 N.W.2d 495, 495 (Minn. 1986)).

112. *Peterson*, 380 N.W.2d at 497. However, the court did note that the time for appeal would begin to run if the court had properly certified a partial final judgment under Minnesota Rule of Civil Appellate Procedure 54.02. *Id.* at 496–97. While an award of attorney’s fees may have implications for a certification under Rule 54.02, that discussion is beyond the scope of this case note.

merits of the case; rather, they were attached to the merits.¹¹³

Interestingly, the *Peterson* court noted that the characterization of attorney's fees as attached to the merits "advances [the] general policy against piecemeal litigation" that is reflected in the Minnesota Rules of Civil Procedure and the analysis in *Spaeth*.¹¹⁴ While the *Spaeth* court agreed that piecemeal appeals should be avoided, it ultimately concluded that the collateral characterization of attorney's fees was the best way to achieve this goal.¹¹⁵ In referring to *Spaeth*'s emphasis on the prevention of piecemeal appeals, however, the *Peterson* court failed to explain how it could support the same policy through the adoption of an opposite holding.

4. *Post-Peterson Litigation*

Since *Peterson*, the Minnesota Supreme Court has realigned itself with the *Spaeth* ruling that attorney's fee issues are collateral to the merits of the case. In *Kellar v. Von Holtum*, the Minnesota Supreme Court held that motions for attorney's fee sanctions, costs, and disbursements are independent of the merits of litigation such that fees can be awarded after an appeal has been decided.¹¹⁶ In support of its holding, the court added that "there is likely to be little, if any, harm caused by waiting to resolve such collateral issues until the merits are resolved."¹¹⁷

However, a 2008 Minnesota Court of Appeals decision is evidence that the *Peterson* decision has blurred any bright-line rule regarding the relationship between attorney's fees issues and an

113. See T.A. Schifsky, 773 N.W.2d at 789–90.

114. *Peterson*, 380 N.W.2d at 497. With the understanding that its holding may weaken judicial efficiency by producing piecemeal litigation, the *Spaeth* court urged appellate courts to take specific actions. *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 825 (Minn. 1984). Referring to subsequent determinations of attorney's fees, the *Spaeth* court "strenuously urge[d] the district courts either to rule on such claims as soon as possible after entry of judgment on the merits, or to not enter judgment on the merits until the fees issue has been finally resolved." *Id.*

115. *Spaeth*, 344 N.W.2d at 825.

116. *Kellar v. Von Holtum*, 605 N.W.2d 696, 700 (Minn. 2000).

117. *Id.* However, the court seems to ignore the fact that the production of piecemeal appeals through the separation of the attorney's fee issues from the merits can be harmful by burdening court dockets. See Green, *supra* note 12, at 276 (noting that the creation of piecemeal appeals is one of the many "disadvantages" of severing attorney's fees from the merits).

underlying judgment on the merits.¹¹⁸ In *City of Waite Park*, the Minnesota Court of Appeals addressed the defendant's argument that the failure to raise the issue of damages in an initial appeal precludes a later assertion of damages.¹¹⁹ In doing so, the court summarized *Peterson* by explaining that when district courts reserve the monetary award of attorney's fees for later determination, the appeal period does not begin to run until entry of an amended judgment adjudicating all issues.¹²⁰

IV. THE *T.A. SCHIFSKY* DECISION

A. *Facts and Procedural History*

In *T.A. Schifsky & Sons, Inc. v. Bahr Construction, LLC*, Consolidated Lumber Company held four mechanic's liens against Bahr Construction.¹²¹ When Consolidated Lumber sought to foreclose on the mechanic's liens, Premier Bank challenged the validity of the liens by asserting that they failed to describe and identify the lien property with reasonable certainty as required by Minnesota law.¹²² On November 26, 2007, the district court found that the liens were valid despite their erroneous listing and produced an order stipulating that Consolidated Lumber was entitled to the value of the liens in addition to reasonable attorney's fees submitted to the court for later approval.¹²³ The district court concluded the order with the following words: "[t]here being no just cause for delay, let judgment be entered accordingly."¹²⁴ Judgment was entered on December 13, 2007.¹²⁵

Premier Bank's motion to amend the district court's findings of fact and motion for a new trial were denied on February 1, 2008, and Consolidated Lumber served Premier Bank with a notice of

118. *City of Waite Park v. Minn. Office of Admin. Hearings*, 758 N.W.2d 347 (Minn. 2008).

119. *Id.* at 354–55.

120. *Id.* at 354.

121. 773 N.W.2d 783, 785 (Minn. 2009).

122. *Id.* Premier Bank asserted this claim based on subdivision 2(5) of section 514.08 of the Minnesota Statutes. *Id.* The mechanic's lien in question identified the lien property as being located in Section thirty-three, Township thirty, Range twenty-two, while the actual location of the property was Section thirty-four, Township thirty, Range twenty-two. *Id.*

123. *Id.* at 786.

124. *Id.*

125. *Id.*

filing of the order denying the motions on February 6, 2008.¹²⁶ On May 22, 2008, the district court awarded Consolidated Lumber \$11,543.74 in attorney's fees, and judgment of the fee order was entered on July 24, 2008.¹²⁷

On July 30, 2008, just six days after the fee order was entered, Premier Bank filed a notice of appeal, citing both the December 13, 2008 lien judgment and the May 22, 2008 attorney's fee order.¹²⁸ In its notice, Premier Bank described the May 22, 2008, attorney's fee order as "a final adjudication of all the remaining issues set forth in the partial judgment . . . entered on December 13, 2007."¹²⁹ On August 27, 2008, the court of appeals dismissed Premier Bank's appeal as untimely by concluding that the December 13, 2007 lien judgment was immediately appealable because it contained express determinations under Minnesota Rule of Civil Appellate Procedure 104.01 and Minnesota Rule of Civil Procedure 54.02.¹³⁰ Rule 54.02 states, in relevant part:

When multiple claims for relief or multiple parties are involved in an action, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.*¹³¹

Rule 104.01 states, in relevant part:

An appeal may be taken from a judgment entered pursuant to Rule 54.02, Minnesota Rules of Civil Procedure, within 60 days of the entry of the judgment *only if the trial court makes an express determination that there is no just reason for delay and expressly directs the entry of a final judgment.* The time to appeal from any other judgment entered pursuant to Rule 54.02 shall not begin to run

126. *Id.*

127. *Id.* It is important to note that the attorney's fees judgment was entered over seven months after the district court's original judgment on December 13, 2007, regarding the liens. *See id.*

128. *Id.*

129. *Id.* (alteration in original).

130. *Id.* In dismissing Premier Bank's notice of appeal, the court of appeals states that the December 13, 2007, district court order "contains the express determinations under Minn. R. Civ. App. P. 104.01 and Minn. R. Civ. P. 54.02 to allow an immediate appeal." *Id.* The T.A. Schifsky opinion implies that the express determinations referenced by the court of appeals refer to the concluding language in the December 13, 2007, district court order: "[t]here being no just cause for delay, let judgment be entered accordingly." *Id.*

131. MINN. R. CIV. P. 54.02 (emphasis added).

until entry of a judgment which adjudicates all the claims and rights and liabilities of the remaining parties.¹³²

According to the court, because the district court made express determinations that the December 13, 2007 order was immediately appealable, Premier Bank was required to file a notice of appeal within sixty days of Consolidated Lumber's notice of filing the February order denying Premier Bank's post-trial motions in order to have maintained a timely appeal.¹³³

B. The Court's Holding

Appealing the dismissal, Premier Bank attempted to persuade the Minnesota Supreme Court that its July 30, 2008 appeal was not untimely because the November 26, 2007 order regarding the liens was not properly certified as a final partial judgment under Minnesota Rule of Civil Procedure 54.02.¹³⁴ The court noted that the language "there being no just cause for delay, let judgment be entered accordingly" does not necessarily make a judgment a final partial judgment under Rule 54.02.¹³⁵ Fundamentally, application of the rule necessitates "multiple claims for relief or multiple parties."¹³⁶ Interpreting the language of the rule and the legal meaning of a claim, the court held that the November 26 district court order was not a final partial judgment under Minnesota Rule of Civil Procedure 52.02, "[b]ecause the amount of attorney fees awarded in a mechanic's lien action is not a separate claim."¹³⁷ In other words, the court held that Rule 54.02 did not apply because the proceedings did not involve multiple claims.¹³⁸

132. MINN. R. CIV. APP. P. 104.01, subdiv. 1 (emphasis added).

133. Minnesota Rule of Civil Appellate Procedure 104.01 states that "an appeal may be taken from a judgment within 60 days after its entry, and from an appealable order within 60 days after service by any party of written notice of its filing." MINN. R. CIV. APP. P. 104.01, subdiv. 1. According to the court of appeals, Premier Bank must have appealed by April 9, 2008, in order for the appeal to have been timely. *T.A. Schifsky*, 773 N.W.2d at 786.

134. MINN. R. CIV. P. 54.02; *T.A. Schifsky*, 773 N.W.2d at 786. Specifically, Premier Bank argued that the November 26, 2007, order was not properly certified as a final partial judgment under Rule 54.02 because the lien judgment, by itself, did not fully adjudicate an entire claim. *T.A. Schifsky*, 773 N.W.2d at 786.

135. *T.A. Schifsky*, 773 N.W.2d at 787.

136. See MINN. R. CIV. P. 54.02.

137. *T.A. Schifsky*, 773 N.W.2d at 788. According to the court, an amount of attorney's fees is not another "legal theory of the lawsuit" that would meet Rule 54.02's requirement of multiple claims. *Id.*

138. *Id.*

Next, in order to determine if the court of appeals properly dismissed the appeal regarding the validity of the liens, the court addressed the question of whether the December 13, 2007 lien judgment was immediately appealable as a final judgment.¹³⁹ The court cited two rules it deemed relevant to the question at hand.¹⁴⁰ Minnesota Rule of Civil Procedure 58.01 states that “[e]ntry of judgment shall not be delayed for the taxation of costs, and the omission of costs shall not affect the finality of the judgment.”¹⁴¹ In addition, Minnesota Rule of Civil Appellate Procedure 104.02 states that the “[t]ime to appeal from the judgment pursuant to this section shall not be extended by the subsequent insertion therein of costs and disbursements.”¹⁴² Relying on its decision in *Obraske v. Woody*,¹⁴³ the court concluded that attorney’s fees in mechanic’s lien cases are considered costs within the meaning of Rules 58.01 and 104.02.¹⁴⁴ As costs, attorney’s fees are collateral to the merits of the underlying litigation regarding the validity of the liens.¹⁴⁵ Therefore, the attorney’s fee determination was not an issue that would prevent the December 13, 2007 judgment from becoming final.¹⁴⁶ Applying these findings to the facts of the case, the court concluded that the appeal period began to run upon entry of the December 17 judgment such that Premier Bank’s appeal regarding the validity of the liens was untimely.¹⁴⁷

In the opinion, Justice Meyer added that characterizing the attorney’s fee determination as collateral to the merits did not contradict the court’s prior holding in *American Family Mutual Insurance Co. v. Peterson*.¹⁴⁸ Justifying her assertion, she explained that the attorney’s fee issue in *Peterson* prevented the running of the appeal period because the fees were “part of the damages owed by the breaching insurer.”¹⁴⁹ However, she added, the case at hand

139. *Id.* at 788.

140. *Id.* at 788–89 (citing MINN. R. CIV. P. 58.01; MINN. R. CIV. APP. P. 104.02).

141. MINN. R. CIV. P. 58.01.

142. MINN. R. CIV. APP. P. 104.02.

143. 199 N.W.2d 429, 432 (Minn. 1972).

144. T.A. Schifsky, 773 N.W.2d at 789.

145. *Id.* Justifying its holding that the attorney’s fees are collateral to the merits of the case, the court cited its previous decisions from 1985–2000 in which it characterized attorney’s fees issues as collateral. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* (citing Am. Family Mut. Ins. Co. v. Peterson, 393 N.W.2d 212, 217 (Minn. Ct. App. 1986), *rev’d*, 380 N.W.2d 495, 495 (Minn. 1986)).

was distinguishable because the attorney's fees pursuant to statute and case law in mechanic's lien cases are considered costs as opposed to damages attached to the merits of the case.¹⁵⁰ Through this analysis, the court illuminated an important dichotomy that drives determination of the effect of attorney's fees on the finality of judgments: fees constituting damages owed are generally connected to the merits of the litigation and must be decided in order for a judgment to be final; however, fees that are merely costs are generally collateral to the merits and do not affect the finality of the original judgment.¹⁵¹

On two occasions in *T.A. Schifsky*, the Minnesota Supreme Court expressly urged Minnesota courts to approach attorney's fee appeals in a manner that prevents piecemeal appeals.¹⁵² After interpreting the application of Rule 54.02, the court provided the following guidance:

We have recognized that this reading of the rules may, in some circumstances, result in piecemeal appeals, but we have also noted that piecemeal appeals are easily avoided if the district court declines to direct the entry of judgment on the merits until it has resolved the attorney fees award¹⁵³

Applying its advice to *T.A. Schifsky*, the court recognized the strategy "was not done in this case."¹⁵⁴

V. ANALYSIS

A. Ensuring Efficiency: Does Minnesota's Approach to Attorney's Fees Produce Unnecessary Inefficiencies by Encouraging Piecemeal Appeals?

1. The Problem of a Second Major Litigation

In *T.A. Schifsky*, the Minnesota Supreme Court explained that when attorney's fees are costs as opposed to damages, the fees are to be considered collateral and independent of the merits of the underlying litigation.¹⁵⁵ When attorney's fees are collateral, potential errors surrounding their administration can be appealed

150. *See id.*

151. *See id.*

152. *Id.* at 788 n.4, 789.

153. *Id.* at 788, n.4.

154. *Id.*

155. *See id.* at 789.

separately from the merits. Hence, the collateral characterization of attorney's fees inevitably gives rise to an important concern regarding judicial efficiency: attorney's fees issues that are collateral to the merits have the potential of burdening the courts through the creation of piecemeal appeals.

Federal courts have often characterized attorney's fees as collateral to the merits of the litigation.¹⁵⁶ As a consequence, the separation of appeals regarding attorney's fees and appeals on the merits is relatively common.¹⁵⁷ In *Hensley v. Eckerhart*, the U.S. Supreme Court noted its concern regarding piecemeal appeals in federal courts when it stated that "a request for attorney's fees should not result in a second major litigation."¹⁵⁸ Other federal courts have echoed the Supreme Court's sentiment.¹⁵⁹ Moreover, scholarly debate has also drawn connections between the federal approach to attorney's fees and potential inefficiencies due to

156. See, e.g., *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (discussing the "recoverability or amount of attorney's fees for the litigation" and concluding that they do not bear on the finality of the underlying case); *White v. New Hampshire Dep't of Emp't Sec.*, 455 U.S. 445, 451–52 (1982) (explaining that a "court's decision of entitlement to fees [under § 1988] will . . . require an inquiry separate from the decision on the merits."); *Echols v. Parker*, 909 F.2d 795, 798 (5th Cir. 1990) ("[A]ttorney's fees are considered collateral to the merits, so that final judgments as to attorney's fees can be appealed separately from the 'merits' judgment."); *Dardar v. Lafourche Realty Co.*, 849 F.2d 955, 957 (5th Cir. 1988) ("[A]wards of attorney's fees may be appealed separately as final orders after a final determination of liability on the merits.").

157. See, e.g., *Torres v. Walker*, 356 F.3d 238, 241 n.3 (2d Cir. 2004) (explaining that the court had jurisdiction over an inmate's immediate appeal of district judge's order of attorney's fees in excessive force § 1983 suit); *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 272 F.3d 936, 937 (7th Cir. 2001) (holding that attorney's fees appeal was properly before the court based on the collateral order exception, because the refusal of an immediate appeal might inflict an irreparable harm on the defendant); *Riverhead Sav. Bank v. Nat'l Mortg. Equity Corp.*, 893 F.2d 1109, 1113 (9th Cir. 1990) (justifying its jurisdiction to hear attorney's fees sanction appeal by explaining that a "sanctions order imposed solely on a *non-party* to pay attorney's fees and costs falls within the collateral order exception to the finality rule and is appealable immediately as a final order.") (emphasis in original); *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1172 (D.C. Cir. 1985) (justifying its jurisdiction to hear an appeal on attorney's fees because the "district court's denial of costs and attorneys' fees fits within the collateral order exception to the finality rule."); *Seigal v. Merrick*, 619 F.2d 160, 164 n.7 (2d Cir. 1980) (justifying jurisdiction to hear an appeal from an order regarding attorney's fees based on the collateral order doctrine).

158. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

159. *Friends of Boundary Water Wilderness v. Thomas*, 53 F.3d 881, 883 (8th Cir. 1995) (quoting *Jenkins v. Missouri*, 838 F.2d 260, 264 (8th Cir. 1988)) ("The case now before us flies in the face of the Supreme Court's admonishment that the 'attorneys' fee issue should not result in a second major litigation.'").

increased appellate litigation.¹⁶⁰

Because Minnesota courts have often characterized attorney's fees as collateral to the merits of the litigation,¹⁶¹ one would expect to find that attorney's fees appeals and appeals on the merits are often separated into different proceedings. However, the same concerns regarding efficiency and piecemeal appeals at the federal level have not come to fruition in Minnesota. As a general proposition, attorney's fees issues in Minnesota have not extensively burdened courts with separate appeals, because Minnesota courts have long recognized¹⁶² the advice embodied by *T.A. Schifsky* and "rule[d] on [attorney's fee] claims as soon as possible after the entry of judgment on the merits."¹⁶³

2. An Important Factor in Preventing Piecemeal Attorney's Fees Appeals: Embracing the Advice of the Minnesota Supreme Court in T.A. Schifsky by Consolidating Appeals

In *T.A. Schifsky*, the Minnesota Supreme Court implicitly recognized that additional attorney's fees appeals could significantly burden the courts.¹⁶⁴ In an attempt to prevent such a problem, the court restated the advice it originally provided in 1984, which was that district court judges should either "rule on such claims as soon as possible after the entry of judgment on the merits or . . . not enter judgment on the merits until the fees issue has been resolved."¹⁶⁵ However, the court did not indicate whether the revitalization of the advice was a response to the unfortunate circumstances in *T.A. Schifsky* or a reflection of the district courts' general unwillingness to apply the advice.

When reviewing Minnesota appellate opinions related to attorney's fees, one is hard-pressed to find cases in which attorney's fees were appealed separately from the underlying merits. While a

160. See Crummins, *supra* note 12, at 488 ("The federal courts of appeals disagree whether a decision on the merits of a case represents a 'final' judgment, and thus is appealable, when the district court has awarded, but not quantified, attorney's fees."); see also Green, *supra* note 12, at 232 (discussing how considerations of court efficiency are tied to the "chameleon-like quality" of attorney's fees at the federal level).

161. See *supra* note 145 and accompanying text.

162. See, e.g., *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 825 (Minn. 1984).

163. *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 788 n.4 (Minn. 2009) (quoting *Spaeth*, 344 N.W.2d at 825).

164. See *id.*

165. *Id.*

number of factors may influence this trend, an important factor is the consolidation of appeals at the appellate level.¹⁶⁶ Despite the fact that attorney's fees can be appealed separately from the merits when they are characterized as collateral, Minnesota Court of Appeals judges generally consolidate attorney's fees appeals with other merit-based appeals.¹⁶⁷ In fact, a detailed review of fees appeals in Minnesota indicates that the practice of consolidation has been commonplace over the past two decades.¹⁶⁸ The frequent practice of consolidating appeals indicates that judges are heeding the Minnesota Supreme Court's advice and ruling on attorney's fee issues "as soon as possible after entry of judgment on the merits."¹⁶⁹

An example of this consolidation practice may illuminate its practical value in combating piecemeal fee appeals. In *State Campaign Finance and Public Disclosure Board v. Minnesota Democratic-Farm Labor Party*, the district court granted the Democratic-Farm Labor (DFL) Party's motion for summary judgment after the Campaign Finance and Public Disclosure Board (Board) initiated a declaratory judgment action.¹⁷⁰ The DFL moved for attorney's fees and costs under the Minnesota Equal Access to Justice Act and was awarded \$24,456 in fees.¹⁷¹ While the motion for attorney's fees was pending, the Board appealed both the summary judgment decision and the attorney's fee amount.¹⁷² On appeal, the summary judgment and attorney's fees issues were consolidated in order to prevent multiple appeals stemming from the same initial litigation.¹⁷³

166. See MINN. R. CIV. APP. P. 103.02, subdiv. 3 ("Related appeals from a single trial court action or appeals in separate actions may be consolidated by order of the appellate court on its own motion or upon motion of a party.").

167. In some situations, consolidating appeals may be impractical due to timing. See *infra* note 174 and accompanying text.

168. See, e.g., *In re Custody of N.A.K.*, 649 N.W.2d 166, 173 (Minn. 2002); *Haarstad v. Graff*, 517 N.W.2d 582, 584 (Minn. 1994); *Welsh v. City of Orono*, 355 N.W.2d 117, 119 n.3 (Minn. 1984); *Brown v. Cannon Falls Twp.*, 723 N.W.2d 31, 39 (Minn. Ct. App. 2006); *Cent. Baptist Theological Seminary v. City of New Brighton*, 487 N.W.2d 528, 529 (Minn. Ct. App. 1992); *Bergmann v. Lee Data Corp.*, 467 N.W.2d 636, 637 (Minn. Ct. App. 1991); *In re Minn. Pub. Utils. Comm'n*, 365 N.W.2d 341, 343 (Minn. Ct. App. 1985).

169. *T. A. Schifsky*, 773 N.W.2d at 788 n.4.

170. *State Campaign Fin. & Pub. Disclosure Bd. v. Minn. Democratic-Farm Labor Party*, 671 N.W.2d 894, 896–97 (Minn. Ct. App. 2003).

171. *Id.*

172. *Id.*

173. *Id.*

Minnesota courts' practice of consolidation illuminates an important tactic in combating potential piecemeal appeals when attorney's fees issues are at stake. As previously noted, when courts characterize the attorney's fee issues as collateral, they theoretically open the door to separately appealing the merits and fees. However, consolidation ensures that both appeals are heard in the same proceeding and therefore minimizes potential piecemeal appeals that may result from the collateral characterization of attorney's fees.

B. Fairness: Does T.A. Schifsky Provide the Clarity That is Necessary to Prevent Untimely Appeals Due to the Characterization of Attorney's Fees?

1. Introduction

In order for a litigant to be afforded the opportunity to appeal a judgment, the litigant must have some knowledge as to whether or not the judgment is considered final and appealable.¹⁷⁴ Unfortunately, jurisdictions tend to differ as to what constitutes a final judgment.¹⁷⁵ One can no longer assume that the last order in the case is the only final appealable order.¹⁷⁶ The finality of a judgment is particularly important in determining the limited window of time in which a particular appeal can be filed.¹⁷⁷

While this note has shown that attorney's fees are often considered collateral to the merits in Minnesota, the Minnesota Supreme Court's decision in *Peterson*¹⁷⁸ and dicta in *T.A. Schifsky* indicate that fees can also be attached to the merits.¹⁷⁹ This raises an important issue. Knowledge as to whether the attorney's fees issues are characterized as collateral to the merits or attached to the merits is a critical factor in appealing within a timely manner. Therefore, how does a litigant in Minnesota know how the attorney fee's issue will be characterized in his or her case?

174. 4 AM. JUR. 2D *Appellate Review* § 79 (2007) (indicating that appeals are generally permitted only from final decisions or judgments).

175. MARY KAY KANE, *CIVIL PROCEDURE IN A NUTSHELL* § 7.1 (6th ed. 2007) ("The question of what constitutes finality is one that has posed significant difficulties for the courts.").

176. Annotation, *supra* note 69, at 271.

177. MINN. R. CIV. APP. P. 104.01 (an appeal must be made within sixty days after the final judgment is entered).

178. *Am. Family Mut. Ins. Co. v. Peterson*, 380 N.W.2d 495, 496 (Minn. 1986).

179. *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 788, 789 (Minn. 2009).

2. T.A. Schifsky: *Adopting the Case-By-Case Approach to the Characterization of Attorney's Fees*

In *T.A. Schifsky*, the Minnesota Supreme Court attempts to provide litigants with the guidance necessary to predict how attorney's fees will be characterized. The court's discussion of fees serves as an implicit recognition that litigants have lacked the necessary guidance to determine whether a judgment is final when a question of attorney's fees remained. While the court emphasizes the important difference between fees as costs and fees as damages, it concedes that "our decision in [*American Family Mutual Insurance Co. v. Peterson*] did not specifically describe the nature of attorney fees at issue."¹⁸⁰ In an effort to resolve ambiguity, the court implicitly reasons that the categorization of attorney fees as damages or costs will resolve the question of whether or not the fee determination prevents a judgment from becoming final and appealable.¹⁸¹

In this sense, the court in *T.A. Schifsky* adopts what Richard S. Crummins has dubbed the case-by-case approach to the characterization of attorney's fees.¹⁸² According to Crummins, a court applying the case-by-case analysis ultimately looks to the purpose for which the attorney's fees are being awarded as a means of determining their relationship to the merits.¹⁸³ When fees are a measure of substantive relief and are part of the initial measure of liability, they are compensatory in nature and are therefore intertwined with the underlying merits of the case.¹⁸⁴ On the other hand, when fees are merely to reduce litigation costs, they are generally collateral to the underlying judgment.¹⁸⁵

Unfortunately, the court in *T.A. Schifsky* oversimplifies the ease with which litigants can confidently categorize the nature of the attorney fees. The arguments made by the parties in *T.A. Schifsky* highlight the complexity of such a categorization.¹⁸⁶ The

180. *Id.* Justice Meyer goes on to explain that even though the attorney's fees in *American Family Mutual Insurance Co. v. Peterson* were not explicitly categorized as costs or damages, it should have been clear that they were damages because they were available based on a breach of a contractual duty to defend. *Id.*

181. *Id.*

182. Crummins, *supra* note 12, at 488–89.

183. *Id.* at 507.

184. *Id.*

185. *Id.*

186. *Compare* Brief of Appellant at 15–17, *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 785 (Minn. 2009) (No. A08-1295), 2008 WL

respondent, Consolidated Lumber, argued that Minnesota case law has established that attorney's fees in mechanic's lien cases are considered "costs."¹⁸⁷ However, the appellant, Premier Bank, reasoned that attorney's fees awarded under the mechanic's lien statute are an element of the claimant's damages because, according to the statute, the attorney's fees become part of the lien amount when the property is sold to satisfy the lien judgment.¹⁸⁸ Considering the merger of the attorney's fees into the lien judgment, it would not be unreasonable to consider them part of the damages that are linked to the underlying merits of the case.

Perhaps the Minnesota Supreme Court should not be faulted for failing to develop clear criteria for an issue that is inherently complex.¹⁸⁹ While particular judgments and orders are more clearly attached to the underlying merits of the case, commentators have noted that it is particularly difficult to determine whether attorney's fee orders are tied to the merits.¹⁹⁰ This is likely because, unlike many orders and judgments, those relating to attorney's fees are often "only tangentially related to the merits" of the case.¹⁹¹

3. *The Need for Clarity in the Characterization of Attorney's Fees: Potential Solutions*

After the ruling in *T.A. Schifsky*, it seems likely that, in some cases, doubt may remain as to whether or not a subsequent determination of attorney's fees prevents the appeal period from beginning to run. Untimely appeals could be prevented by encouraging litigants to appeal an initial judgment on the merits even if it seems that the attorney's fee issue is tied to damages.

7212058 (arguing that attorney's fees must be considered damages under the mechanic's lien statute because the statute mandates that fees awarded must be included in the lien amount and judgment), with Brief of Respondent at 12–13, *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 785 (Minn. 2009) (No. A08-1295), 2009 WL 4548824 (arguing that the mechanic's lien statute and prior case law has categorized attorney's fees as collateral costs such that they do not affect the finality of the original judgment).

187. Brief of Respondent, *supra* note 186, at 12; see also *Obraske v. Woody*, 199 N.W.2d 429, 432 (Minn. 1972).

188. Brief of Appellant, *supra* note 186, at 16; see also MINN. STAT. § 514.14 (2008) ("Judgment shall be given in favor of each lienholder for the amount demanded and proved, with costs and disbursements to be fixed by the court at the trial, and such amount shall not be included in the lien of any other party . . .").

189. See Annotation, *supra* note 69, at 271.

190. *Id.*

191. *Id.*

However, this runs counter to the policy underlying the final judgment rule of preventing “fragmentary and premature appeals that unnecessarily delay the administration of justice” and encouraging one appeal per case.¹⁹²

A solution to the confusion in *T.A. Schifsky* may be the development of a bright-line rule in which attorney’s fees are characterized as collateral to the merits in all cases. It is unlikely that the legal community would be greatly affected by such a rule because, as demonstrated by the previous discussion regarding efficiency, Minnesota courts primarily characterize attorney’s fees as collateral. A unified collateral characterization would also prevent litigants from being forced to wait until attorney’s fee determinations are complete to collect a judgment or begin appealing substantive issues. Moreover, as discussed in the previous section, a collateral characterization generally does not produce piecemeal appeals because Minnesota district court judges are resolving fee issues in time to consolidate the appeals. Finally, a bright-line collateral rule would eliminate any confusion litigants face when trying to predict how attorney’s fees issues will be characterized in order to appeal in a timely manner. Had a bright-line rule been in place prior to *T.A. Schifsky*, Premier Bank may have appealed the original judgment in a timely manner without waiting for the pending attorney’s fee determination.

An alternative solution may be the development of a procedural rule that forces district court judges to issue a *sua sponte* order characterizing attorney’s fees issues as either collateral or attached to the merits. Particularly where attorney’s fees are available through a statute, district judges would have the ability to analyze the statutory language and determine whether or not the fees in question, if implicated, would be attached to the underlying merits of the case.¹⁹³ In addition, such a rule must also provide the litigants with an opportunity to brief arguments relating to the

192. 4 AM. JUR. 2D *Appellate Review* § 81 (2007).

193. Attorney’s fees may be available to a litigant because they are prescribed in a statute that is implicated in the case. *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 789 (Minn. 2009). Attorney’s fees may also be available where the wrongful acts of the defendant have involved the plaintiff in litigation or have placed the plaintiff in a situation in which he or she is forced to incur expense for the protection of his or her rights or interests. ROSSI, *supra* note 8, at § 8:3. However, because a determination of attorney’s fees based on a wrongful act will depend on facts that may arise during the trial, it would be more difficult for a judge to make a decision regarding the fees’ relationship to the merits prior to trial in that particular circumstance.

characterization of the attorney's fees prior to the judge's decision. The briefs could be submitted at a time that would permit the judge to render a decision at a Rule 16 pre-trial conference.¹⁹⁴

The utility of a *sua sponte* ruling is significantly diminished if the district court's determination may be overturned on appeal. Therefore, in order for the rule to maintain its purpose of providing clarity to litigants, determinations made under it must be final and non-appealable. While the non-appealable nature of such an order may significantly diverge from ordinary appellate practice, it would nevertheless ensure that litigants would possess the knowledge as to whether a subsequent attorney's fee determination will affect the finality of a judgment. This knowledge, in turn, will allow the litigant to accurately gauge the appeal period for a particular issue in order to avoid filing in an untimely manner.¹⁹⁵

VI. CONCLUSION

The analysis of Minnesota courts' approach to attorney's fees has yielded mixed results. As seen in federal courts, the collateral characterization of attorney's fees opens the door to potential piecemeal appeals. However, Minnesota courts have long combated this potential judicial inefficiency by following the advice originally outlined in *Spaeth* and renewed in *T.A. Schifsky* that attorney's fees claims should be decided as soon as possible after the entry of judgment. This expediency has, in turn, allowed appellate courts to reduce piecemeal appeals through the consolidation of attorney's fees appeals and appeals on the merits.

However, the court's adoption of a case-by-case approach to the characterization of attorney's fees in *T.A. Schifsky* is unlikely to provide litigants with the clarity to determine whether attorney's fees are considered collateral to the merits or attached to the

194. See MINN. R. CIV. P. 16.01 ("In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial.").

195. It is worth noting that such a preliminary determination regarding the nature of the attorney's fees in *T.A. Schifsky* may have prevented Premier Bank's untimely appeal. Had the trial court judge made an irreversible preliminary ruling that the attorney's fees were costs that were collateral to the merits of the case, Premier Bank would have likely been alerted to the fact that the attorney's fee claim would not be considered a separate claim on its own merits under Minnesota Rule of Civil Procedure 54.02. Therefore, in such a case, Premier Bank may have appealed at an earlier time under the presumption that the initial judgment was final and appealable.

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merits. As demonstrated in *T.A. Schifsky*, when the nature of the attorney's fees is unclear, litigants may be prone to filing an untimely appeal. Minnesota courts would be wise to consider solutions that would eliminate the case-by-case approach to attorney's fees in favor of a mechanism that favors clarity and certainty in characterizing attorney's fees. Regardless of the approach, the advice given by Michael Green over twenty-five years ago still rings true today: "providing clear and certain rules to govern the multifaceted procedural problems raised by the relationship among the merits, attorney's fees, and appeals is of paramount importance."¹⁹⁶

196. Green, *supra* note 12, at 301.